IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
073224

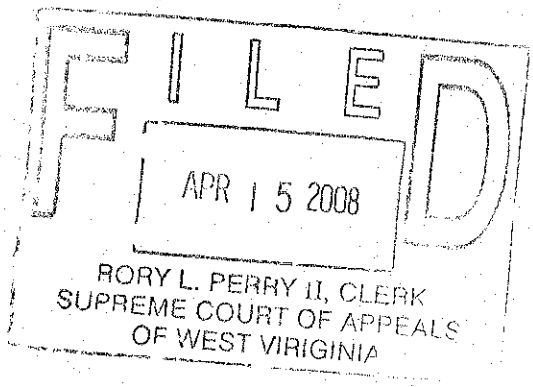
The HONORABLE RICHARD THOMPSON, Speaker of the West Virginia House of Delegates, and the HONORABLE EARL RAY TOMBLIN, President of the West Virginia Senate,

Appellants/Defendants Below,

v.

THE COMMITTEE TO REFORM HAMPSHIRE COUNTY GOVERNMENT, MICHAEL HASTY, VERA ANDERSON, ROBERT SHILLING, FRANK WHITACRE, KAY DAVIS, ROBERT WALKER, SHIRLEY CARNAHAN, and MARVIN HOTT,

Appellees/Plaintiffs Below.



APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF APPEAL

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April 15, 2008

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APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF APPEAL

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW.

This is an appeal from a Final Order of the Circuit Court of Kanawha County, the Honorable Paul Zakaib, Jr., presiding, entered on April 9, 2007 granting a declaratory judgment to the Committee to Reform Hampshire County Government on the interpretation of Article IX, §13 of the Constitution of West Virginia. The time in which to appeal said order was extended until October 9, 2007, by order entered June 27, 2007.

The Committee to Reform Hampshire County Government filed a complaint seeking a declaratory judgment ruling that the Legislature must process enabling legislation authorizing an election to reform the Hampshire County Commission. The complaint which was served on the Legislative Appellants on August 24, 2005. Appellants/Defendants below (hereinafter referred to as "Appellants"), answered the complaint on September 2, 2005. Thereafter, the matter was set for hearing on cross motions for judgment on the pleadings on January 20, 2006. By agreement of the parties, certified questions were submitted to the West Virginia Supreme Court of Appeals on April 14, 2006. By Order dated June 28, 2006, the Supreme Court declined to hear the Petition for Review of Certified Questions.

A hearing was held on October 3, 2006, on Appellees'/Plaintiffs' below (hereinafter "Appellees") and Appellants' renewed cross motions for judgment on the pleadings. By order entered April 9, 2007, the circuit court granted the request of Appellees for a declaratory judgment. It is from that order that Appellants seek relief. The lower court granted Appellants' motion for stay and enlargement of time in which to appeal on June 28, 2007, while the Court considered Appellees' Rule 60 motion for relief from order granting declaratory judgment. By order dated August 16, 2007, the lower Court denied Appellants' motion for relief from judgment.

II. STANDARD OF REVIEW.

A *de novo* standard of review is appropriate because this appeal presents questions of law involving interpretation of the W. Va. Constitution. *Hartley Hill Hunt Club v. County*

Com'n of Ritchie County, 647 S.E. 2d 818, *citing Syl. pt. 1, Chrystal R. M. v. Charlie A. L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

III. STATEMENT OF THE FACTS.

The facts of the case are not in dispute. The Committee to Reform Hampshire County Government (hereinafter the "Committee" or "Appellees"), submitted a "Petition for a Hampshire County Tribunal" (hereinafter "Petition") to the Hampshire County Commission (hereinafter "Commission"). The Commission forwarded the Petition to the Legislature with a cover letter dated May 20, 2003. The Commission certified to the Legislature that the Petition had sufficient signatures to meet the requirements of Article IX, §13 (hereinafter "§13") of the West Virginia Constitution.[1] The letter also expressed the Commission's concerns regarding the constitutionality of the Petition's directives.[2] The Petition was received by the Senate and House of Delegates (hereinafter "House") on or

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[1] *See*, the letter to the House Clerk with Petition form attached. (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit No. 3]).

[2] Three concerns were raised in the letter of the Commission:

1) "[t]he provisions proposing electing tribunal members from voting districts as opposed to the entire county";

2) "terms of office of less than six (6) years"; and

3) "requiring the hiring of a county administrator by the tribunal."

Note: The provision that mandates the hiring of a county administrator goes beyond the scope of the allowed county commission reformation process as contemplated in §13. The petition language states as a directive of the petition: "Following a national search, a county administrator shall be hired by the Tribunal to carry out the day-to-day business of the county as prescribed by the Tribunal. Said county administrator shall be an employee of and answerable to the Tribunal."

about January 15, 2004. The Senate referred the Petition to the Committee on Government Organization. The House referred the Petition to the Committee on Political Subdivisions with a second reference to the Committee on the Judiciary.[3]

During the 76th Legislature of West Virginia, 2004 Regular Session, Senate Bill 727 and House Bill 4396 were originated in Committee calling for the reformation of Hampshire County's government pursuant to the Petition.

The sponsors of Senate Bill 727 and House Bill 4396 had concerns regarding the constitutionality of the Petition's directives. They addressed these concerns in the bills by requiring the Attorney General, upon passage of the reformation legislation, to file a declaratory judgment action in the Circuit Court of Kanawha County to ascertain the constitutionality of the enactment.[4]

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[3]*See Journal of the Senate*, 76th Legislature, Regular Session, Vol. 1, p. 76, (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit No. 1]) and *Journal of the House of Delegates*, 76th Legislature, Regular Session, Vol. 1, p. 62; (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit No. 2]).

[4]Both Senate Bill 727, sponsored by the Senate Committee on Government Organization and House Bill 4396, sponsored by Mr. Speaker, Mr. Kiss and Delegates Staton and Proudfoot, contained the following section:

> **§6. Legislative mandate.**
>
> (a) Notwithstanding the provisions of this act, the Legislature has serious concerns as to whether the petition presented to it from the Hampshire County Commission is a valid petition and whether the act created as a result of the petition is constitutional. The petition requests a new tribunal, the election of which may be in violation of the provisions of section 10, article IX of the constitution of West Virginia, which provides that county commissioners shall be elected by the voters of the county. Generally, the Legislature will take such steps to modify any requested legislation so as to preserve the presumption that any act of the Legislature is constitutional. However, in light of the holding in Taylor County Commission v. Spencer, 285 S.E.2d 656 (W. Va. 1981), whenever the Legislature receives a petition to reform, alter or modify a county commission, the Legislature

In 2004, during the Regular Session of the 76th Legislature of West Virginia, both Houses considered the legislation. The Senate passed Senate Bill 727 and referred it to the House for consideration. However, the Session ended without the House passing either bill.[5]

At the next regular session in 2005, a new and constitutionally different Legislature, the 77th Legislature of West Virginia, was conveyed and was in authority. House Bill 3291 was introduced on March 25, 2005 and was referred to the House Committee on Political Subdivisions. It did not include the provision requiring a challenge by the Attorney General to the reformation.[6] House Bill 3291 was not reported from Committee.

The House also introduced bills during the 77th and 78th Legislatures of West Virginia (2006 and 2007 Regular Sessions) which would have authorized a reformation

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> has an obligation to see that the act upon which the people of the county will vote embodies the substance, spirit and intent of the petition. Changing the present act to correct the perceived constitutional defect would result in a substantial departure from the reform proposal.
>
> (b) It is the intent of the Legislature that the voters of Hampshire County shall not bear the burden, expense and consequences of electing a new tribunal only to have the new governmental body later abolished and held invalid. Therefore, the office of the attorney general shall, upon or after the effective date of this act, file a declaratory judgment action with the court of appropriate jurisdiction and obtain a decision as to the validity and constitutionality of the original petition and the ensuing act. In the event the office of the attorney general does not file the declaratory judgment action in a timely manner, any interested or affected party may initiate the declaratory judgment action on their own. The provisions of this act shall be held in abeyance pending a ruling on the declaratory judgment action.

[5]*See* procedural history of House Bill 4396 and Senate Bill 727, 2004 Regular Session of the 76th Legislature of West Virginia (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit No. 4]).

[6]House Bill 3291(2005) 77th Legislature of West Virginia, and its procedural history (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit No. 5]).

election in Hampshire County. The 2006 bill, House Bill 3291, was not reported out of the Committee on Political Subdivisions.[7] In 2007, House Bill 3036 passed the House, but was not enacted by the Senate.[8]

No action was taken on the Hampshire County Reformation Petition by the Legislature during the 2008 Regular Session of the 78th Legislature of West Virginia.[9]

IV. ASSIGNMENTS OF ERROR.

A. The Lower Court Erred in Failing to Recognize the Legislature's Inherent Authority to Exercise Discretion in the Enactment Process.

1. Article IX, §13 Does Not Impose a Mandatory Duty on the Legislature to Perform a Purely Ministerial Act.

2. Article IX, §13 When Read in Conjunction with Article III, §3 Does Not Supercede the Legislature's Duty under Article VI, §16 to Uphold the Constitution.

B. The Lower Court Erred in Finding That the Legislature Had a Constitutional Duty to Pass an Unconstitutional Act.

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[7] *See* House Bill 3291 (2006) 77th Legislature of West Virginia, Bill Status Bill History Report. (Attachment 1 of the Petition for Appeal and Memorandum in Support thereof from a Final Order of Judge Paul Zakaib, Jr.).

[8] *See* House Bill 3036 (2007) 78th Legislature of West Virginia, Bill Status Bill History Report. (Attachment 2 of the Petition for Appeal and Memorandum in Support thereof from a Final Order of Judge Paul Zakaib, Jr.).

[9] Although not dispositive of this case, but introduced as a result of the issues raised by this case, the Senate and House adopted Rule 32, Joint Rules of the Senate and House, during the 2008 Regular Session, which provided a process for reformation requests. The Legislature also enacted Senate Bill 784 which provided statutory guidelines for counties considering reformation. These documents may be viewed or retrieved at *www.legis.state.wv.us.* In addition, Senate Bill 740, which authorized the Berkeley County Commission to reform its county commission was passed.

1. **The Hampshire County Petition Contains Unconstitutional Components.**

2. **The *Spencer* Case must Be Reconciled with the Requirements of the Constitution.**

C. **Article IX, §13 Does Not Require the Legislature to Consider a Reformation Petition Beyond the Session in Which the Petition Was Received.**

V. HOW ISSUES WERE DECIDED BY LOWER COURT.

1. The Legislature has a mandatory duty to enact the enabling legislation that will permit Hampshire County citizens to vote on the proposed alternative form of government. West Virginia Constitution, Article VI, §39 and §39a and Article IX, §13; *Taylor County Commissioner v. Spencer*, 169 W. Va. 37, 285 S.E.2d 656 (1981).

2. A county may alter its county commission by creating a tribunal whose members are elected only by the voters within each member's district. West Virginia Constitution, Article VI, §39a and Article IX, §13; *Taylor County Commission v. Spencer*, 169 W. Va. 37, 285 S.E.2d 656 (1981).

3. The Legislature's duty under Article IX, §13 to honor a county's request for a referendum on county government reform does not expire with the end of the legislative term. West Virginia Constitution, Article IX, §13; *Crain v. Bordenkircher*, 193 W. Va. 362, 456 S.E.2d 206 (1995); *Taylor County Commission v. Spencer*, 169 W. Va. 37, 285 S.E.2d 656 (1981); *Pauley v. Kelly*, 162 W. Va. 672, 718, 255 S.E.2d 859, 883 (1979).

4. Article III, §3 and Article IX, §13 of the West Virginia Constitution guarantee to the citizens of each county the right to alter and reform their mode of county governance into any democratically-elected form.

VI. ARGUMENT

A. The Lower Court Erred in Failing to Recognize the Legislature's Inherent Authority to Exercise Discretion in the Enactment Process.

This Court has long held that the right of the Legislature to act is within the sovereign power granted to it by the people through the Constitution. "The test of legislative power in this state is constitutional restriction, and what the people have not said in the organic law their representatives shall not do, they may do." *State Road Com'n v. Kanawha County Court*, 112 W. Va. 98, 163 S.E. 815, 816 (1932) (internal citations omitted). The sovereignty of the people is limited by the organic law of the Constitution which defines the methods for exercise of power as well as the methods for changing the government. The accepted method for changing the government is the power of the vote either by changing those elected to represent the people, (*See State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 737, 474 S.E. 2d. 906, 917 (1996)) or through changing the constitution.[10]

[10]The West Virginia Constitution was significantly rewritten in 1872 to reflect the increased political power of southern democrats and the demand of the majority of the people to repeal the harsh limitation on personal freedoms and penalties imposed on former confederates during the reconstruction era. *See, i.e.*, Milton Gerofsky, *Reconstruction in West Virginia*, West Virginia History, Vol. VII, 1945-1946. Since 1901, there have been seventeen (17) individual amendments made to the Constitution in addition to sixty amendments to Articles I through XIV.

The people, through the constitution, declare their rights and delegate the powers of government. The people did not reserve unto themselves an exclusive and absolute right to hold an election for the reformation of county commissions because §13 requires legislative action. When the Legislature is requested to consider a bill or resolution, its members must exercise discretion. There can be no enactment without the collective will of a majority of legislators in the Senate and the House.

Article III, §3 does not allow the people or any branch of government to circumvent specific grants of constitutional authority, rather it requires the people to engage in the political process in order to bring about change. In this instance the people who wish to change the form of county government collect signatures of like minded voters equal to ten percent of the registered voters in the county, submit the petition to the county commission who in turn will request the Legislature take up the petition for consideration. The legislative process then subjects the petition to the collective discretion of the 134 members of the Legislature. As clearly evidenced by the repeated attempts over the past four Legislative Sessions, there has not been sufficient support to enact legislation necessary to authorize an election in Hampshire County. No matter what political or social circumstances cause this result, it is beyond the authority of the courts to look at the policy behind legislative actions. As this Court has long held, under the principles of separation of powers, "the court cannot question or review the wisdom of any legislative policy; instead, the Legislature's policy choices can only be subjected to review by the ultimate constitutional reviewing authority: the scrutiny of the people at the ballot box." *Hartley Hill Hunt Club v. County Commission of Ritchie County*, 220 W. Va. 382, 647 S.E.2d 818, 823

(2007), *quoting*, Syl. Pt. 1, *Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

The determination of the lower court that the Legislature may not exercise discretion in determining whether to authorize a reformation is incongruous with the operations of this branch of our government. To the extent that §13 is read to preclude the judgement of the members of the Legislature to decide what action to take or not take on a bill before it, affronts the broader organic principles of legislative prerogative.

1. Article IX, §13 Does Not Impose a Mandatory Duty on the Legislature to Perform a Purely Ministerial Act.

In the case at bar, the lower court declared as a matter of law, that the Legislature had a mandatory, nondiscretionary or ministerial duty to consider the petition for reformation of Hampshire County's Commission at each regular session of the Legislature until a bill is successfully enacted. In effect, the circuit court told the members of the Legislature they had to vote yes on the reformatory legislation. It is beyond the power of the court to issue such an edict.

When considering the lower court's finding, it is illustrative to look at how this Court has interpreted the terms nondiscretionary and ministerial in the context of mandamus actions. A "nondiscretionary" or "ministerial" duty is "one that is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance." *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (1998). (*See also Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972); *State ex rel. State v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999). There is nothing in the legislative enactment process that qualifies under this definition of a nondiscretionary or ministerial duty.

The legislative process in enacting bills epitomizes the exercise of discretion. Each of the 134 members of the Legislature must exercise his or her own discretion when casting a vote. The courts cannot order members of the Legislature to enact or the Governor to sign specific legislation. What the courts may do, in the proper exercise of their authority, is determine the validity of enactments and in appropriate cases retain jurisdiction to assure the remedy granted is carried out. For example, in *Crain v. Bordenkircher*,[11] the prison conditions of confinement case this Court retained jurisdiction of the case after it ordered the penitentiary at Moundsville closed so that it could receive progress reports from the Division of Corrections. The Legislature, the Governor and other constitutional officers were made parties, but the Court never ordered specific legislation to be passed or an appropriation to be made, in order to carry out the court's mandate to build a new prison that would meet constitutional requirements.

An analogous situation would be the actions taken by the Legislature in response to the submission of bills by the Governor. When the Governor submits bills during a legislative session or issues a proclamation for a special session, he or she is merely presenting subjects for consideration by the Legislature. The extent and manner in which those subjects are dealt with by the Legislature cannot be limited or enhanced by the Governor. He or she cannot dictate the contents of an act enacted by the Legislature. The act will either become law or be vetoed, it cannot be amended or altered by the Governor. *State Road Commission of West Virginia v. West Virginia Bridge Commission*, 112 W. Va.

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[11]The case originated with petitions for habeas corpus in 1981 and was concluded in 1995 with the opening of a new penitentiary. *See Crain v. Bordenkircher*, 181 W. Va. 231, 382 S.E.2d 68 (1989); *Crain v. Bordenkircher*, 193 W. Va. 362, 456 S.E.2d 206 (1995).

514, 166 S.E. 11 (1932). Likewise, the courts cannot enact legislation or tell the Legislature how to vote. *See Syl. Pt.* 2, *Hodges v. Public Service Commission*, 110 W. Va. 649, 159 S.E. 834 (1931).

> "[t]he Legislature cannot commit to the judiciary powers which are primarily legislative. Article V of the Constitution applied."

The plain language of §13 shows that consideration of a reformation petition is not a ministerial duty.

> The Legislature shall, upon the application of any county, reform, alter or modify the county commission established by this article in such county, and in lieu thereof, with the assent of a majority of the voters of such county voting at an election, create another tribunal for the transaction of the business required to be performed by the county commission created by this article. Whenever a county commission shall receive a petition signed by ten percent of the registered voters of such county requesting the reformation, alteration or modification of such county commission, it shall be the mandatory duty of such county commission to request the Legislature, at its next regular session thereafter, to enact an act reforming, altering or modifying such county commission and establishing in lieu thereof another tribunal for the transaction of the business required to be performed by such county commission, such act to take effect upon the assent of the voters of such county, as aforesaid. Whenever any such tribunal is established, all of the provisions of this article in relation to the county commission shall be applicable to the tribunal established in lieu of said commission. When such tribunal has been established, it shall continue to act in lieu of the county commission until otherwise provided by law.

(Emphasis added). Upon receipt of a reformation petition by the county commission, it "shall" be the mandatory duty (no discretion allowed to the county commission) to "request" (unquestionably discretionary) the Legislature to enact a bill "at its next regular session."

When the Legislature drafted the 1974 amendment to §13 it did not restrict its ability to act by inserting the words shall or mandatory duty to command legislative action. The

omission of these words reflects the Legislature's intent to retain its discretion. Under the general principles of statutory construction, which are also applicable to construction of constitutional provisions, the fact that a word or concept was not included in the provision is conclusive proof that the framers intended to leave it out. *Harbert v. Harrison County Court*, 129 W. Va. 54, 39 S.E. 177, 186 (1946).

Contrast the 1974 amendment of §13 with the 1974 amendment to Article VIII, §7, *General Provisions Relating to Justices, Judges and Magistrates* to fill a vacancy in any of these offices if more than two years remain on the term, ".... the governor *shall* issue a directive of election to fill such vacancy in the manner prescribed by law...." The use of the word shall in §7 is a mandatory duty on the Governor to cause an election. Clearly the Legislature understood the difference between creating a discretionary duty to vote under §13 on whether or not to enact a bill authorizing an election and a nondiscretionary, ministerial duty to cause an election in §7.

2. Article IX, §13 When Read in Conjunction with Article III, §3 Does Not Supercede the Legislature's Duty under Article VI, §16 to Uphold the Constitution.

The lower court reasoned that §13 implicates fundamental principles expressed in Article III, §3 of our Constitution which states that in the face of a government that is "inadequate or contrary" to its constitutional purpose, the majority has the absolute right to "reform, alter or abolish" such government. The lower court held that art. III, §3 read in conjunction with §13 guarantees citizens the right to reform county government in any way so long as it was a democratically-elected form. This ignores the rest of Article III, §3 which further states that reform shall be done "in such manner as shall be judged most

conclusive to the public weal." The manner for such reform of a county commission is prescribed in §13 which requires reformation requests to go through the legislative process.

Every time the electorate votes new people into office, they are expressing a desire to change their government. This is the accepted method for changing government and exercising the constitutionally protected right to vote. The right to vote does not diminish the legislative process required by §13.

Article VI §16 provides that the members of the Legislature are sworn to uphold the Constitution. When deciding matters before the Legislature, the collective judgement of the members of the Legislature as to the legality of a proposal and its public benefit dictate the outcome of consideration of a legislative proposal.

However, pursuant to the argument of Petitioners, the Legislature shall introduce a bill based on the petition from the county and enact the bill without any decision being made on the constitutionality of the petition. This argument is not valid.

All decisions regarding whether to advance the bill in a committee, to amend the bill or to vote for or against the bill, are solely up to the members of the Legislature. When voting on the question of reformation, as in the case of the Hampshire County petition, the members of the Legislature decided that the petition had constitutional questions and that it was not in the "public weal" for Hampshire County.

The mandatory duty of the members of the Legislature to uphold the constitution cannot be superceded by a county's right to reform their government.

B. The Lower Court Erred in Finding That the Legislature Had a Constitutional Duty to Pass an Unconstitutional Act.

1. **The Hampshire County Petition Contains Unconstitutional Components.**

The Legislature is prohibited from acting in a manner that violates the state and federal constitutions, and therefore, cannot be compelled to perform an unconstitutional act. To the extent that citizens are allowed to use petition as a method to reform their county government, it must be consistent with the basic constitutional restraints that limit that exercise of governmental power. Failure to recognize legislative prerogative to determine the legality of an act would be a usurpation of all legislative power and authority. Are legislators required to turn a blind eye to all provisions contained in the petition? As an example, should the Legislature be required to enact a reformation containing a requirement that candidates for office of county commission have to be white protestant males? Clearly, the insertion of the Legislature into the reformation process anticipates deliberation of its members and potentially, amendment of the reformation petition.

It is procedurally impossible to cause legislation to go through the legislative process without some element of discretion and judgment being applied to that legislation by the members of the Legislature. The generally deliberative nature of the legislative process is inherent to the Legislature as noted by the West Virginia Supreme Court in *Sutherland v. Miller*, 79 W. Va. 796, 91 S.E. 993 (1917), where the Court found that the Legislature could not confer on a Judge the ability to initiate an investigation into election law violations upon his own initiative. The court eloquently defined the roles of each branch and the legislative branch specifically:

> No authority definitely defines the exact boundary line beyond which neither department may be deemed to intrude or impinge upon the exclusive prerogatives of either of the other

> co-ordinate governmental departments. Such limitation is impossible of delineation. In the enactment of any statute the Legislature, in a limited sense, necessarily and properly exercises judgment, discretion, and deliberation. It investigates the facts, conditions, and circumstances, and from the knowledge or information acquired in that process determines the necessity and propriety of the legislation the object of which is to promote the general welfare of the public whom it represents.

Sutherland, 91 S.E. at 994.

Our courts have long recognized that the nature of legislative power is the sole power and authority of enactment.

> Briefly stated, legislative power is the power of the law-making bodies to frame and enact laws. This power covers a very wide scope. Indeed, except where it is limited by the provisions of the State and Federal Constitutions, that power is practically and essentially unlimited. In the Legislature rests the power to apply the police power of the State, and every other power which confers governmental authority not directly, or by necessary constitutional implication, vested in the executive or judicial departments of the State.

State v. Huber, 129 W. Va. 198, 40 S.E.2d 11, 18, (1946).

The established tenant of constitutional and statutory construction is when the meaning is clear, the words mean what they say:

> ..It is a well established principle of constitutional construction that '[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed. ...[a] cardinal rule of statutory construction, which of course applies to construction of constitutional provisions as well, is that a statute, or in this case a constitutional amendment, must be considered in its entirety, with effect given, if possible to every word or phrase within the provision'.

State ex rel. City of Princeton v. Buckner, 180 W. Va. 457 at 461, 377 S.E.2d 139 at 144. (Internal citations omitted). The language of §13 without equivocation, relates only to the

makeup and design of a proposed tribunal; no more, no less. As this Court held in *Chesapeake and Ohio R. Co. V. J. S. Miller, Auditor*, 19 W. Va. 408 (1882):

> The language of the Constitution being clear and free from ambiguity, and the words used, due regard being had to their grammatical construction, embodying, as they do, a definite meaning, which involves no absurdity and no contradiction between different parts of the same instrument, the meaning apparent on the face of the instrument is the one, which alone, we are at liberty to say was intended to be conveyed, and we are not at liberty to look beyond the instrument itself.

Chesapeake & Ohio R. Co., at p. 20.

See e.g., State ex rel. Dewey Portland Cement Co. v. O'Brien, 142 W. Va. 451, 96 S.E.2d 171 (1956) and *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543 (1961), 122 S.E.2d 436.

Section 13 is a limited grant of the right of citizens to call for a reformation of a county commission. The word "reform" is defined as "to put or change into an improved form or condition."[12] The form of the tribunal is the sole question §13 allows county voters to consider.

The Hampshire County Petition states:

> Petition for a Hampshire County Tribunal
>
> ...Tribunal Membership
>
> The Tribunal shall be made up of one member from each Hampshire County voting district; only the registered voters of their respective district elect their members...

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[12]*Dictionary.com. Merriam-Webster's Dictionary of Law. Merriam-Webster, Inc., http://dictionary.reference.com/browse/reform* (accessed: October 05, 2007).

The term "voting district" is defined in §1-2-1 and §1-2-2 of the West Virginia Code as those geographic areas as defined by the bureau of the census of the United States department of commerce for the taking of the two thousand census of population and described on census maps prepared by the bureau of the census."

Voting districts under §1-2-1 are for Senatorial Districts and have a different makeup from the voting districts under §1-2-2 for the House of Delegates. It cannot be determined from the Petition which voting district (Senatorial or House) is to be used to elect the Tribunal members.

Since Hampshire County has more than one type of and multiple voting districts, the voters of the entire county are not voting for the members as required under Article IX

§10.[13] The petition is fatally flawed because of the requirement that county commissions be elected from "voting districts."

In addition, the Hampshire County Petition requested that tribunal members would serve for terms of less than six years in violation of Article IX, §10 which provides "[t]he commissioners shall be elected by the voters of the country, and hold their office for a term of six years,..." The only exception to holding a six year term is for the initial meeting of the commission so that the commissioners are each elected for staggered terms. Six year terms for county commissioners have been required by our Constitution since 1880. *See* 1879 Acts, p. 179. W. Va. Code, as amended, 1884, art. VIII, §23.

As required by Article IX, §10, the members of the Tribunal "shall be elected by the voters of the county." Our Constitution sets forth express language distinguishing when

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[13]**§1-2-1. Senatorial Districts.**

(15) The counties of Hampshire, Hardy, Morgan, Pendleton, Pocahontas, Randolph and voting district 22, blocks:

. . . and 9721003029, of Berkeley, voting districts 1, 2, 3, 4, 5, 6, 7, 11, 12 and 13 of Grant and voting districts 33 and 39 of Upshur shall constitute the fifteenth senatorial district;

§1-2-2. Apportionment of membership of House of Delegates.

(50) The fiftieth delegate district is entitled to one delegate and consists of:

(A) Voting districts 9, 11, 12, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26 and 28 of Hampshire County; and

(B) Voting districts 7, 9 and 32 of Mineral County.

(51) The fifty-first delegate district is entitled to one delegate and consists of:

(A) Voting districts 2, 4, 6, 7 and 21 of Hampshire County; and

(B) Voting districts 1, 2, 4, 5, 6, 7, 8, 13, 18 and 23 of Morgan County.

officials representing a county are to be elected within a district and when they are to be elected countywide. For example, a "district" shall elect the official during an election to represent a certain state legislative delegate district. The constitution provides that "the counties of Pleasants and Wood shall form the first delegate district, and elect three delegates. . ." W. Va. Const. art. VI, §8. The constitutional provision that sets forth the state senatorial districts and election of state senators also expresses that "[every] district shall elect two senators. . ." W. Va. Const. art. VI, §4. Another example is found in Article XII, Section 6, which provides that "the school board of any district shall be elected by the voters of the respective district. . ." W. Va. Const. art. XII, §6.

In contrast, there are many instances where the voters of the entire county as a whole constitute the elective body. For example, the Constitution states that "the voters of each county shall elect a clerk of the circuit court." W. Va. Const. art. IX §9. Nearly identical language expressly stating that a county official is to be elected by "the voters of a county" is found in the Constitution for the election of county commissioners, the clerk of a county commission, land surveyors, prosecuting attorneys, assessors and sheriffs. W. Va. Const. art. IX, §10; W. Va. Const. art. IX, §12 ; and W. Va. Const. art. IX, §1.

Thus, it appears that when the framers of our constitution wanted officials elected by district they clearly expressed that desire. Following the Court's rationale in *Harbert, supra*, that which is clearly expressed is to be followed. Accordingly, county commissioners or tribunal members should be elected countywide.

Should the Court rule that district elections are acceptable under Article IX, §10, "the voters of a county" language for all other elected officials who are currently elected

countywide would be eligible for districtwide elections. This would seem to have a significant negative impact on our constitutional framework.

According to Article IX, §13, citizens of a county have the right to reform their county government. Since the word "reform" is not defined in the constitution, it is unclear whether the following declarations in the Petition exceed the scope of reform:

> ...Compensation:
>
> Each member shall be compensated $250.00 per Tribunal meeting attended and be reimbursed for expenses incurred while performing official duties as sanctioned by the Tribunal. No other benefits shall be awarded members....
>
> County Administrator:
>
> Following a national search, a county administrator shall be hired by the Tribunal to carry out the day-to-day business of the county as prescribed by the Tribunal. Said county administrator shall be an employee of and answerable to the Tribunal...

It is Appellants' belief that these two provisos exceed the meaning of reform in §13.

In the instant case, the Legislature received the Petition from Hampshire County and found constitutional questions concerning the Petition. Since the Court in *Taylor County Commission v Spencer*, 169 W. Va. 37, 285 S.E.2d 656 (1981), assailed the Legislature for making changes to the Petition in the enacted legislation, the Legislature felt it could not make changes, could not enact unconstitutional legislation and therefore, attempted to assure the Courts would reconcile the differences by having the Attorney General file a declaratory judgment action. This dilemma over the question of constitutionality of the reformation request had a profound impact. In the end, the Legislature did not pass any legislation.

2. The Spencer Case must Be Reconciled with the Requirements of the Constitution.

The lower court erred in finding, as a matter of law, that "[t]he Legislature has a mandatory duty to enact the enabling legislation that will permit Hampshire County citizens to vote on the proposed alternative form of government."

To fully understand the constitutional requirements for reforming county government and the relationship with the constitutional requirements of the Legislature in the process, one must look to the history of the constitutional provisions in question.

The original provision allowing county reformation was added to our Constitution in 1872 as article VIII, §34. In so far as the 1872 Constitution provided for reforming the county court [commission], it did not grant the Legislature discretion.[14] The county court could apply to the Legislature to "reform, modify or alter the county court" and to create "another court or other tribunals." The Legislature was bound to authorize an election to consider a different form of county government which "conformed to the wishes of the county making application."

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[14] The Legislature shall upon the application of any county, reform, modify, or alter the County Court established by this Constitution, in such county, and in lieu thereof, with the assent of a majority of the voters of said county, voting at any election held for that purpose, create another Court, or other tribunals, as well for judicial, as for police and fiscal purposes either separate or combined **which shall conform to the wishes of the county making the application,** but with the same powers and jurisdiction herein conferred upon the County Court, and with compensation to be made from the county treasury.

If two or more adjoining counties shall prefer to unite in the election of a Judge to hold a County Court, in their respective counties, they shall, with the assent of a majority of the voters of each of said counties be authorized, for all the purposes of judicial organization, to do so in the manner, and upon the terms above set forth: *Provided,* that the courts so created shall, in their provisions, be made to conform to the policy of the State, as prescribed in this Constitution. (Emphasis added).

Although the majority of the delegates to the Constitutional Convention of 1872 wanted the return of the county court system, political reality caused them to modify the system rather than return to the old Virginia form of county government in its entirety. West Virginia's return to the county court system in 1872 allowed those in power to regain some control over local government and restore a measure of political power to the southern democrats. As reported in the *Wheeling Intelligencer*, the efforts of the delegates to the Constitutional Convention of 1872 fell "far short of pleasing some of the old time members who desired to go back half a century when [the county court] was the embodiment of aristocratic self perpetuating gentility of the county, where men of leisure met once a month to run the politics of the State, and arrange matters so that common folks need not spend time considering what they knew so little about." *W. Va. Constitution of 1872*, April 12, 1872, p. 3. (*See* Exhibit A, attached hereto).

The Committee on the Judicial Organization of the State recommended to the 1872 Constitutional Convention, "a return to the county court system." The court was to be made up of a president and justices of the peace. Each county was to be divided into a minimum of three districts up to a maximum of ten districts. The voters of each district were to elect two justices of the peace to serve the district (*See* §29). The county clerk, by contrast, was to be elected by the voters of each county. (*See* §34). Section 38 gave the Legislature the power to reform the county court upon the application of any county. Any such reformation had to be approved by the voters of the county. This section was amended by the Convention to allow a county or multiple counties to seek reformation of their county courts. The Legislature was required to conform to the wishes of the county

or counties making application." *Wheeling Intelligencer*, April 12, 1872. (*See* Exhibit B, attached hereto).

Concerns were raised over the propriety of mixing the legislative, judicial and executive functions of government into one body. *Kanawha Daily*, March 8, 1872. (*See* Exhibit C, attached hereto). While the county court system as adopted, included all of the governmental functions, the controversy did result in some compromises. One compromise was to allow a county to propose a different form of county government to "create another court, or other tribunals therein, as well for judicial, as for police and fiscal purposes either separate or combined." W. Va. Constitution of 1872, art. VIII, §34. (*See* Exhibit A, attached hereto). This language would allow a county to have a court for the judicial functions and some other tribunal or tribunals to deal with administration of the county and protection of its citizens.

During the debate of a proposed amendment to remove the words "have the power" from the first line of §34, a discussion of the role of the Legislature in the reformation process ensued.

Thomas R. Park, of Jackson County, requested on behalf of his county, as well as others, that they be allowed to adopt a different system of the peoples' choosing, conditional only on the consent of a majority of the voters without the "necessity of lobbying or fighting a bill through the Legislature in order to secure that system that is desirable in many counties of this State." He went further to request that it be made a "constitutional court and not a court created by an act of the Legislature." *Kanawha Daily*, March 8, 1972, *supra*.

Ultimately the 1872 constitutional amendment allowed counties to seek a change in the form of county government legislative authorization. However, the bill in the Legislature authorizing an election on the proposed county change was to "conform to the wishes of the county making the application". Art. VIII, §34, W. Va. Constitution of 1872. Therefore, the only fight would be getting the bill passed in the Legislature.

This lack of discretion by the Legislature must have proven to be problematic because the mandate that the Legislature comply with the requested form of county government was removed when §34 was revised to remove the judicial functions and moved to Art. IX, §29 in 1880. Inasmuch as there is no record of the legislative debate in 1879 when Joint Resolution No. 10 [county reformation constitutional amendment] was adopted, 1879 Acts, c. 1., one must look to the plain meaning of the words, or lack thereof, in the constitutional amendment.[15] General principles of statutory construction apply when courts interpret a constitutional provision:

> Questions of constitutional construction are governed by the same general rules as those applied in statutory construction.
>
> ...It is a well established principle of constitutional construction that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed. ...[a] cardinal rule of statutory construction, which of course applies to

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[15] The Legislature shall upon the application of any county, reform, alter or modify the county court established by this article in such county, and in lieu thereof, with the assent of a majority of the voters of such county, voting at an election, create another tribunal for the transaction of the business required to be performed by the county court created by this article; and in such case, all the provisions of this article in relation to the county court shall be applicable to tribunal established in lieu of said court. And when such tribunal has been established, it shall continue to act in lieu of the county court until otherwise provided by law. W. Va. Const. art. IX §29 (1880).

> construction of constitutional provisions as well, is that a statute, or in this case a constitutional amendment, must be considered in its entirety, with effect given, if possible to every word or phrase within the provision.

State ex rel. City of Princeton v. Buckner, 180 W. Va. at 457, 377 S.E.2d at 144. (Internal citations omitted).

On its face, the 1880 amendment removed the mandatory duty of the Legislature to authorize an election on county reformation which conformed to the county's request. Thereafter, the Legislature was free to act on a reformation request in the same manner as it would any other proposed legislation. The Legislature could, in fact, propose a tribunal different from the one requested. It would be up to the voters of the county to accept or reject the proposal.

Section 29 was amended again in 1974 when it became the current Art. IX, §13. The 1974 amendments were primarily for the reorganization of the court system. The constables and justices of the peace were eliminated, the magistrate court system was instituted and the sheriff assumed the duties of the constables. The focus of the constitutional reforms was directed at the creation of the magistrate court system. Although the fiscal and police duties had been previously separated from the judicial functions of the county court, the 1974 amendments actually moved the provisions for reformation of county government from the judicial to the county government article of the constitution and inserted the voter petition as another method to achieve reformation.

From its inception in 1872, the constitutional provision for reforming county government clearly created a method for a county to change the operation of its county administration, but it did not provide a method for the voters of the county to seek

reformation on their own initiative. For the first time, the 1974 amendments created a second method to reform county commissions through a petition signed by ten percent of the registered voters. Upon receipt of a petition the county commission has a "mandatory duty" to "request the Legislature, at its next regular session thereafter, to enact an act reforming, altering or modifying such county commission." W. Va. Const., art. IX, §13.

In amending the constitution in 1880, the people chose not to require the Legislature to comply with the wishes of the county nor did they require the Legislature to act. The citizens did not impose a mandatory duty on the Legislature to enact enabling legislation in response to the petition in the 1974 amendment. As the Appellants previously stated, the Legislature is bound by the authority granted by the people. In the absence of a requirement to act in a specific manner, one cannot presume that the Constitution prohibits the Legislature from engaging in the full range of actions available to it on any piece of proposed legislation.

Returning to the 1872 Constitution, the county court had three members, the president of the court and two justices of the peace, unless the Constitution required more; for example, to levy taxes. The president and clerk of the county court were elected by the voters of the county as a whole. The election of justices of the peace was by districts. In 1872, art. VIII, §25 provided that each county was laid off into a minimum of three districts and no more than ten districts and that the voters of each district elected one or two justices of the peace. At the time, each county was divided into townships. The township would remain in effect until the county court changed them. The county court had three members, the president of the court and two justices of the peace, unless the Constitution

required more; for example, to levy taxes. The president and clerk of the county court were elected by the voters of the county as a whole. W. Va. Constitution, art. VIII, §24 and §30.

The Amendments to the Constitution in 1880 transferred the judicial duties of the county court to the circuit courts. The justices of the peace no longer sat as part of the county court, but did retain the judicial functions and continued to be elected by districts.

Effective with the adoption of the 1880 amendments, the administrative, police, road and other such functions of the county government were transferred to the new county commission. The county commissioners, as well as the county surveyor of lands, prosecuting attorney, sheriff, county clerk and assessor were all elected by the voters of the county. Art. VIII, §23 and §26; art. IX, §1. From 1880 forward, county commissioners should have been elected by the voters of the county rather than by districts.

However, in the seventeen reformations identified in defendants' memorandum in support of their cross motion for judgment on the pleadings and response to petitioners' motion for judgment on the pleadings some of the counties were allowed to elect commissioners by district and some by countywide elections.

Six instances of a single reformation by an individual county were found. In each instance the reformation was enacted into law by the Legislature and approved by the voters.[16] The remaining reformations have occurred in five counties, with seven of those

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[16]Six counties have undergone a single referendum since 1872, those include Marion (1895); Pocahontas (1903); Tucker (1913); Randolph (1915), Taylor (1978), and Wirt (2000). In each case the reformation was presented to the voters of the County. In each case the members of the body were to be elected by the voters within the district, not the county voters as a whole. The membership of the county/court/commissions ranged from four in Pocahontas to nine members in Randolph. (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit 6]).

reformations occurring by an act of the Legislature repealing a prior reformation that had been voted on and enacted by the voters of the county. Grant County has twice had its district elected commissioners repealed by the Legislature, with one reformation lasting eight years and the next forty years.[17] Preston County has reformed itself four times, each time on its own initiative.[18] Ohio County has reformed three times, in 1872 by act of the Legislature, amended in 1909 to reduce the number of commissioners to three and grant additional powers to the new board of commissioners and finally in 1923 when the Legislature again amended the prior Act, to, among other things, increase the pay of the commissioners.[19] Barbour County was reformed in 1925 into eight districts, elected from the voters therein. In 1933, the Legislature repealed this design in favor of the three member countywide commissioner system. Tyler County chose to go with six commissioners elected by district in 1927, however, it went back to three commissioners

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[17]Grant County, 1913 reformation had three district elected commissioners. This was repealed by the Legislature in 1921 and replaced by three commissioners elected countywide which was not presented to the voters for ratification. The 1927 reformation had three members district elected. It was repealed in 1967 in favor of a countywide election of commissioners. This was not presented for ratification by the voters. (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit 7]).

[18]Preston County reformed in 1883, to have eight members elected countywide. It was reformed in 1887 to eight commissioners elected by district. In 1933, the county requested reformation to have three commissioners elected countywide, but appears to have been defeated by the voters. In 1988, the commission became three members elected countywide. (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit 8]).

[19]The1872 referendum created a single county judge for Ohio County, with ten commissioners elected from ten districts, by the voters of the individual districts. In 1909, a three member board of commissioners replaced the single judge and ten commissioners. The subsequent amendments by the Legislature in each of the three years were not presented for ratification by county voters. (Defendants' Memorandum in Support of Their Cross Motion For Judgment on the Pleadings and Response to Petitioners' Motion for Judgment on the Pleadings [Exhibit 9]).

elected countywide in 1934. 1927 Acts, c. 145; 1934 Acts, c. 128. (*See* Exhibits D and E attached hereto).

Our Constitution sets forth express language distinguishing when officials representing a county are to be elected within a district and when they are to be elected countywide. For example, a "district" shall elect the official during an election to represent a certain state legislative delegate district. The constitution provides that "the counties of Pleasants and Wood shall form the first delegate district, and elect three delegates. . ." W. Va. Const. art. VI, §8. The constitutional provision that sets forth the state senatorial districts and election of state senators also expresses that "[every] district shall elect two senators. . ." W. Va. Const. art. VI, §4. Another example is found in art. XII, §6, which provides that "the school board of any district shall be elected by the voters of the respective district. . ." W. Va. Const. art. XII, §6.

In contrast, there are many instances where the voters of the entire county as a whole constitute the elective body. For example, the Constitution states that "the voters of each county shall elect a clerk of the circuit court." W. Va. Const. art. VIII, §9. Nearly identical language expressly stating that a county official is to be elected by "the voters of a county" is found in the Constitution for the election of county commissioners, the clerk of a county commission, land surveyors, prosecuting attorneys, assessors and sheriffs. W. Va. Const. art. IX, §10; W. Va. Const. art. IX, §12 ; and W. Va. Const. art. IX, §1.

Thus, it appears that when the framers of our constitution wanted officials elected by district they clearly expressed that desire. Following the Court's rationale in *Harbert, supra*, that which is clearly expressed is to be followed. Accordingly, county commissioners or tribunal members should be elected countywide.

Should the Court rule that district elections are acceptable under Article IX, §10, "the voters of a county" language, all other elected officials who are currently elected countywide would be eligible for districtwide elections. This would seem to have a significant impact on our constitutional framework.

In *Spencer*, the Supreme Court held that Art. IX, §10 requires county commissioners to be elected by the voters of the entire county rather than by magisterial districts. The citizens of Taylor County filed a reformation petition with the Taylor County Commission on March 7, 1977, which expressed their dissatisfaction with the current commission system. The petitioners wanted three additional commissioners to represent the outlying regions of the county. The petition specifically requested that the reformed county government have a total of six commissioners, one for each magisterial district. The Taylor County Commission received the reformation petition on February 7, 1977.

According to correspondence addressed to the Senate Clerk, that petition did not contain sufficient signatures. A supplemental petition was received by the Commission on March 7, 1977. By letter dated March 11, 1977, the Commission forwarded the Petitions and Certification of Required Signatures to the Senate. *Journal of the Senate*, 63rd Legislature, Regular Session, 16 March 1977, pp. 720-721. (*See* Exhibit C, attached hereto). Senate Bill No. 629 was introduced on March 28, 1977, and referred to the Committee on the Judiciary. *Journal of the Senate*, 63rd Legislature, Regular Session, 28 March 1977, p. 1074. (*See* Exhibit C). House Bill No. 1750 which was the same as Senate Bill 629, was also introduced in the House of Delegates. *Journal of the Senate*, 63rd Legislature, Regular Session, 9 April 1977, pp. 2629-2630. (*See* Exhibit C). The bills

provided for the election of a county commissioner from each magisterial district without specifying a number. Unfortunately, Senate Bill 629 died on second reading in the Senate. *Journal of the Senate*, 63rd Legislature, Regular Session 9 April 1977, pp. 2629-2630. (*See* Exhibit C).

In what appeared to be an attempt to thwart the will of the petitioning citizens, the commission redistricted the county into three magisterial districts on December 20, 1977. *Spencer*, 169 W. Va. 38, 39, 285 S.E. 2d 657, 658.

The action of the commission to change the number of magisterial districts was lawfully taken pursuant to the provisions of W. Va. Code §7-2-2. The Legislature has no authority to override the commission's exercise of its discretion under this provision.

Accordingly, the Legislature, during the 1978 legislative session, passed enabling legislation authorizing the voters of Taylor County to choose whether to modify the county government. *Id.* Contrary to the language of the reformation petition but in accordance with the commission's change in magisterial districts, the Act stated that the purpose of the modification was to elect county commissioners by the voters of each of the three magisterial districts rather than elect six commissioners, one from each district, by the voters of the county at-large. 1978 Acts, c. 112; 169 W. Va., 40, 285 S.E. 2d 659.

At the June 3, 1980 primary election a special ballot was submitted to the voters to choose whether to modify the Taylor County Commission. At the same election, the voters throughout the county were to select candidates from the central magisterial district for county commission. The modification of the county commission was approved by the voters. Based on the enabling legislation, the ballot commissioners placed the nominees for county commission only on the general election ballots of the central magisterial district.

As a result, a petition for writ of mandamus was filed in the Circuit Court of Taylor County seeking to compel the ballot commissioners to put the names of the candidates for county commission on all of the general election ballots in the county. The circuit court ruled that the legislation allowing county commissioners to be elected by the voters in the magisterial district which they represented was unconstitutional and ordered the names of the candidates for county commissioner placed on all of the ballots for the general election. The county commission appealed the decision to the Supreme Court and petitioned for a writ of prohibition to restrain the circuit court's order.

The court reviewed the various constitutional provisions relating to the election of county commissioners and reformation of a county commission. The court, in reaching its decision that the commissioners had to be voted on countywide, discussed art. IX, §13, which is at the heart of this instant action. The court held that "when [the] legislature responds by [the] enactment process. . . to a petition requesting . . . an alternative form of county government, it has an obligation to see that [the] act upon which people of the county will vote embodies [the] substance, spirit and intent of [the] petition." *Spencer, supra*. The Court was of the opinion, that the use of the word "shall" in the first line of §13 conferred on the Legislature a mandatory duty to "expedite, within constitutional parameters, the will of the citizens of the county by producing enabling legislation which reflects the stated preference of the petitioning voters . . . . [i]n effect, the Legislature is obligated by the constitution to vindicate the desires and designs of the voters of the county. This it is constitutionally required to do and beyond this it cannot act." *Spencer*, 169 W. Va. 46, 285 S.E.2d at 658.

However, as the Court opined that the Legislature was bound by the confines of the petition and performs a ministerial function, Appellants contend the reasoning of the Court to be based on an erroneous reading of the Constitution.

Within the legal and historical framework set forth above, it is clear that *Taylor County Commission v. Spencer*, 169 W. Va. 37, 285 S.E.2d 656 (1981), does not accurately reflect the true intent of §13. First, the Court apparently did not have the benefit of comparing the three versions of §13 to see that the Legislature was not required to follow what the county or petitioners requested. Secondly, the Court misread §13. The Court in *Spencer* read the second sentence of §13 as though it were part and parcel of the first sentence when it determined that the Legislature was required to embody the "substance, spirit and intent of the petition" in the legislation calling for an election on the reformation of the county commission. When a county or its citizens seek a change in the form of county government, the Legislature has full discretion to act, rather than the performance of a ministerial duty. In that regard, *Spencer* does not control the outcome of this case.

In support of its position that the Legislature did not have the authority to act outside the wishes expressed in the petition, the court in *Spencer* likened the situation to initiative and referendum. Section 13 requires votes by two sovereign powers: First, the members of the Legislature and then, the voters of the county. As discussed above, the power of the voters to initiate reformation of the county commission by submitting a petition is a limited right under our Constitution. Likewise, absent a clear constitutional prohibition, the Legislature in a state with initiative and referendum can restrict, amend or repeal statutes adopted by the voters. "The examination of these constitutional provisions and reported

cases referring to constitutional and charter prohibitions plainly depict that there was no universal or general concept of the inviolability of initiated or referred measures. Reference in each instance must be had to the particular constitutional or charter provision." *Adams v. Bolin*, 247 P.2d 617 (Ariz. 1952).

In the case at bar, the constitution reserves to the Legislature the ability to act through omission or commission on a request by way of a petition from county voters to reform the county commission. Even conceding, for the sake of argument, that the direct request by a county commission to reform itself is a constitutional mandate, the Legislature's ability to change the design of a commission or tribunal is not specifically limited by the Constitution.

In 1974 the "Judicial Reorganization Amendment" was presented to the voters. *Com. Sub. For Senate Joint Res. No. 6, 1974 Acts,* p. 946. It was ratified at the 1974 general election. Although it did not contain the recommendations of the commission on constitutional revision to offer alternative forms of county government, it did, for the first time, allow the voters to ask the Legislature directly to modify or reform a county commission. In authorizing the voters to petition for reformation, the1974 constitutional amendment did grant the citizens a greater voice, but not the only voice in how the county would be governed. By inserting the necessity of legislative action before the citizens' wishes could be put to a vote in the county, the amendment retained the unfettered ability of the Legislature to act on the request. It is this reservation of power to the Legislature that was overlooked in *Spencer*. This discretion was decried and lamented during the Constitutional Convention and to some extent, it prevailed. But the Legislature was and is part of the reformation process and the fight to get a bill passed or to "kill" a bill that is

unwanted remains an integral part of the legislative process. When the history and language of Article IX, §13 is fully considered, it is obvious that *Spencer* was incorrectly decided.

C. Article IX, §13 Does Not Require the Legislature to Consider a Reformation Petition Beyond the Session in Which the Petition Was Received.

The plain language of §13 provides that upon receipt of a petition for reformation the county commission has a mandatory duty to "....request the Legislature, at its next regular session thereafter, to enact an act reforming, altering or modifying such county commission...." This contemplates that the Legislature will receive the petition and place it before the members of each House in accordance with the rules of the Senate and House.

The process for receipt of a petition requires consideration of the petition during that term of the Legislature only. The legislative process has changed little in form since its creation, and the manner of doing business each legislative day is regulated by the rules of each house.[20] Because legislative power is exercised by and limited to adopting or rejecting bills and resolutions, any action on a petition for reformation is subject to those procedures and processes.[21] No petition, bill or other document can be presented to either

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[20]W. Va. Const. art. VI, §24 provides in pertinent part "Each House shall determine the rules of its proceedings..."

[21]The state Senate in Rule 7 and the House in Rule 65 provide for receipt of petitions as an order of business as part of the daily calender. Each petition is received and dealt with pursuant to the rules of each house. Senate and House Rules are available at www.legis.state.us.

House without the sponsorship of a member of the respective house.[22] The process for initiating action upon receipt of a petition is an order of business for each house each legislative day.[23] The petition is received and referred to a committee for further consideration.[24] Bills, resolutions or petitions are not carried over from one legislative session to the next and expire without a legislative procedure for further consideration.[25] Without receipt of a new petition, there is no mechanism to start another referendum process. To the extent that the petition causes a sequence of events to occur, it only happens once. Petitions are directed to the "sitting legislature." When that Legislature has completed its term, all petitions, bills and other legislative documents not dealt with are delegated to historical records with no further force or effect.

The Petition in this case was submitted by the Hampshire County Commission and considered by the Legislature during the 2004 Regular Session of the 76th Legislature.[26] Upon consideration of the reformation in that Session, the responsibility of the 76th

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[22]All petitions and papers received by the Legislature are by tradition introduced by a member. Senate Rule 15 states that "all bills and resolutions shall be presented in quadrupuplicate, bearing the name of the member or members by whom it is to be introduced." House Rule 111 provides "All petitions, remonstrances, memorials and other papers addressed to the House shall be filed by the member with the Clerk prior to the convening of the House."

[23]Senate Rule 7 and House Rule 65.

[24]House Rule 111 provides for committee referral of all petitions. The Senate has no specific rule requirement, but by tradition refers petitions to committees, as it did the Hampshire County petitions.

[25]However House Rule 92a allows any bill or resolution to be carried over to the second year of a legislative session upon approval by the bill sponsors. The Senate has no such rule, therefore new bills and resolutions must be introduced each year.

[26]The Hampshire County petition was referred to the Rules Committee in the House and the Committee on Government Organization in the Senate. (Defendants' Motion and Memorandum of Law in Support of Their Motion for Declaratory Judgment [Exhibits 1 and 2]).

Legislature to act ended. The next year 2005, a new and constitutionally different Legislature, the 77th Legislature, convened following the 2004 elections in which all delegates and one half of the senators were elected. Since 2004, new members have been elected, and new voters have qualified in Hampshire County. The petition, to the extent it bound the Legislature, expired with the 76th term of the Legislature. Although individual members have taken it upon themselves to introduce reformation bills, no further action of any kind is or was required by the 77th Legislature, the current 78th Legislature or any subsequent Legislature.

Although case law on the issue of judicial review of legislative procedures is very limited, the Iowa Supreme Court addressed the issue whether the judiciary can ever compel a state Legislature to apply its own procedures in *Des Moines Register v. Dwyer*, 542 N.W.2d 491 (Iowa, 1996). The Court concluded that the rules of procedure could not violate fundamental rights, but the review stops there:

> It is entirely the prerogative of the legislature, however, to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules so long as constitutional questions are not implicated.

542 N.W.2d at 496. *See also, Abood v. League of Women Voters*, 743 P.2d 333 (Alaska, 1987); *Moffitt v. Willis*, 459 So.2d 1018 (Fla. 1984).

Because §13 requires legislative action in order to effectuate a petition, the outcome on any referendum petition is tied to that process. No special restriction or mandate was ever imposed on the Legislature by the Constitution for consideration of reformation petitions. Therefore, the petition to reform Hampshire County Commission is controlled by the Legislature's rules and by those rules it is dead.

VII. CONCLUSION

The citizens of a county have the right to reform their county government under W. Va. Const. art. III, §13, but members of the Legislature are required by Article VI, §6 to support the Constitution. Since the members of the Legislature have discretion when enacting laws, when a petition for reform of a county government is unconstitutional and unclear as to its intent, then the Legislature has the right and duty to act or not act, and under Article V, §1, neither the Executive or Judicial branches shall dictate to the Legislature.

RELIEF PRAYED FOR

For the foregoing reasons, Appellants, Earl Ray Tomblin and Richard Thompson, move this Court to vacate the judgment, reverse the Final Order of the Circuit Court of Kanawha County and any other relief this Court deems appropriate.

Respectfully submitted,

Earl Ray Tomblin, President
West Virginia State Senate
Richard Thompson, Speaker
West Virginia House of Delegates,

By Counsel,

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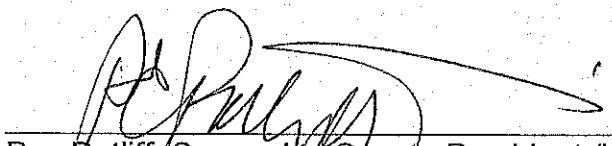

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IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

073224

The HONORABLE RICHARD THOMPSON,
Speaker of the West Virginia House of Delegates,
and the HONORABLE EARL RAY TOMBLIN,
President of the West Virginia Senate,

Appellants/Defendants Below,

v.

THE COMMITTEE TO REFORM HAMPSHIRE COUNTY GOVERNMENT, MICHAEL HASTY, VERA ANDERSON, ROBERT SHILLING, FRANK WHITACRE, KAY DAVIS, ROBERT WALKER, SHIRLEY CARNAHAN, and MARVIN HOTT,

Appellees/Plaintiffs Below.

CERTIFICATE OF SERVICE

Come now the Appellants, Richard Thompson and Earl Ray Tomblin, by counsel, and hereby certify that on the 15th day of April, 2008, true copies of the foregoing "Appellant's Motion to Exceed Fifty Page Limit" and "Memorandum in Support of the Petition" were served as follows:

The original and nine copies
Via Hand Delivery
Rory L. Perry II, Clerk
Supreme Court of Appeals
State of West Virginia
State Capitol Building - Room E-317
Charleston West Virginia 25305

One copy of each document
Via Regular U.S. Mail
Robert M. Bastress, Jr., Esquire
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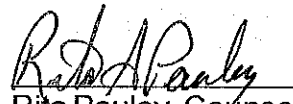

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